Filed 3/4/19 P. v. Mueller CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER MUELLER, Defendant and Appellant.	2d Crim. No. B286479 (Super. Ct. No. 2014003331) (Ventura County)

Peter Mueller appeals a judgment after a jury convicted him of vandalism (Pen. Code,[1] § 594, subd. (b)(1)). The trial court suspended imposition of sentence and granted him three years of probation. Mueller contends the trial court erred when it denied his motion to continue trial and his midtrial request to present an expert witness. He also contends his counsel rendered ineffective assistance. We affirm.

[1] Further unspecified statutory references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

Mueller lived next door to Kenneth and Reva Corney for almost 20 years. In the early 2000's, the Corneys planted a queen palm tree on their property near the property line they shared with Mueller.

In 2013, Mueller hired a contractor to replace a wooden fence separating his property from the Corney's property with a block wall. The Corneys agreed to the project.

The Corneys stopped the project shortly after it began because they were concerned with some of the work done on their property. The Corneys and Mueller got into a dispute about the correct location of the property line between their houses.

Mueller hired a contractor to do some work on his front yard and asked the contractor to "take out" the queen palm tree. The contractor cut down the tree. The Corneys never gave permission to cut down their tree. Mrs. Corney took photographs of the license plates of the trailers and trucks as they hauled the tree away.

Mrs. Corney told Sheriff's Sergeant James Kenney that she and her husband were in an ongoing dispute with Mueller. She showed Kenney photos of the truck and trailer, and Mr. Corney sent a surveillance video which showed the tree being cut down.

Kenney went to Mueller's house to discuss the incident with Mueller. Mueller said "I don't have anything to say," and shut the door.

In 2015, an investigator interviewed Mueller about the incident. Mueller said his contractor told him the tree was damaged by the backhoe and had to be removed for safety

reasons. He said he ordered the contractor to remove the tree but was not at home when it was removed. He said he did not talk to the Corneys about the tree removal before it was cut down.

The investigator reviewed the security footage of the incident. The video shows the backhoe did not come into contact with the tree before it was cut down. The video also shows Mueller at his house minutes before the tree was cut down.

Mr. Corney obtained a $1,236.25 estimate for a queen palm tree and delivery without installation. A landscaper estimated it would cost $2,459.18 to install a comparable palm tree.

In June 2017, defense counsel moved to be relieved as counsel. The trial court denied the motion. On August 10, 2017, on the date set for trial to begin, counsel renewed his motion to be relieved and represented that he was not ready for trial. The court denied the motion to be relieved, but continued trial to September 11.

On September 11, the defense produced its witness list. The prosecution objected to the untimely disclosure of the witness list pursuant to section 1054 et seq. The prosecution requested that the court exclude three witnesses on the list. The court denied the motion with respect to two witnesses (Mueller's wife and a land surveyor), and granted the motion as to another witness on the ground that there was no offer of proof as to that witness.

Defense counsel said he was not ready to proceed with trial and requested a three-week continuance. He said he had not spoken to Mueller or the witnesses for three months, in part because he believed he would be relieved as counsel. He also said he tried communicating with Mueller through e-mail,

regular mail, and phone calls, but Mueller did not respond. The court denied the motion. The court noted that "whatever delay has happened with respect to [trial] preparation . . . would appear to be largely the making of the defendant. The defendant is never permitted to benefit from his own conduct."

Near the close of the prosecution's case, the defense sought to present a new witness, a horticultural expert. The defense did not provide a witness statement or report, but it made an oral representation that the expert would testify the tree was worth $290. The court denied the motion, finding "no good cause" to excuse the defense from complying with disclosure rules. It noted the defense had known for several months that the prosecution intended to call an expert, who would testify that the value of the tree replacement was over $400 (the felony threshold amount pursuant to section 594, subdivision (b)(1)), but the defense showed "no diligence" in timely obtaining evidence to dispute the tree's value.

DISCUSSION

Continuance

Mueller contends the trial court erred when it denied the September 11 motion for a three-week continuance after his counsel said he was not ready to proceed. We disagree because Mueller and his counsel did not demonstrate due diligence in preparing for trial.

We review the trial court's decision to deny the trial continuance for abuse of discretion. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) A continuance "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) A showing of good cause requires counsel and the defendant prepare for trial with due diligence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

To determine whether good cause for a continuance exists, a trial court "must consider ""not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion."" [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450 (*Doolin*).)

The trial court did not abuse its discretion when it denied the continuance because Mueller and his counsel did not demonstrate due diligence in preparing for trial. Defense counsel admitted he did not talk to any of the witnesses or Mueller for three months, in part because he expected to be relieved as counsel. However, his request to be relieved as counsel was denied in July and again in August. Counsel then had a month to prepare for trial, but admits that he did not talk to any of the witnesses or his client during this time. The record also reflects Mueller did not demonstrate due diligence because he did not communicate with counsel, despite counsel's multiple attempts to contact him. Because Mueller contributed to the lack of trial preparation, he was not "permitted to benefit from his own conduct."

Furthermore, a continuance would have burdened the court and wasted scarce judicial resources. When counsel requested a further continuance, a panel of prospective jurors was already on hold for the trial. Based on the circumstances, the court acted within its discretion to deny the continuance.

Expert Witness

Mueller contends the trial court erred when it excluded the defense expert because less drastic sanctions were

available. We disagree that the court erred when it excluded the witness under the circumstances.

The purpose of section 1054 et seq. is to allow parties to obtain information to prepare their cases and reduce the chance of surprise at trial. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201 (*Jackson*).) "Reciprocal discovery is intended to protect the public interest in a full and truthful disclosure of critical facts, to promote the People's interest in preventing a last minute defense, and to reduce the risk of judgments based on incomplete testimony." (*Ibid*.)

During pretrial discovery the defense "must disclose the names of witnesses they intend to call and any written or recorded statements by those witnesses." (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247; § 1054.3, subd. (a).) Unless good cause is shown, such disclosures must "be made at least 30 days prior to the trial," or if the information becomes known within 30 days of trial, it must be disclosed "immediately." (§ 1054.7.) A court may make any order necessary to enforce these discovery rules. (§ 1054.5, subd. (b).) A court may prohibit the testimony of a witness "only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).) A court can exclude testimony without exhausting other remedies when the discovery violation caused "significant prejudice" and amounted to "willful conduct" designed to obtain a tactical advantage at trial. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1757-1758 (*Gonzales*).) We review the trial court's choice of sanction for a discovery violation for abuse of discretion. (*Jackson*, *supra*, 15 Cal.App.4th at p. 1203.)

The trial court did not abuse its discretion when it prohibited the defense expert's testimony because the record

supports the determination that the discovery violation was willful. The defense knew months before trial that the valuation of the tree would be an issue in the case. Nothing prevented counsel from obtaining an expert at least 30 days before trial. But the defense waited until near the end of the prosecution's case to disclose its expert witness. (See *Jackson*, *supra*, 15 Cal.App.4th at pp. 1200-1201, 1203 [discovery violation was willful where the defense knew about an allegedly exculpatory statement for three months but did not attempt to introduce it into evidence until after the prosecution rested].)

Moreover, the prosecution would have been substantially prejudiced by the late disclosure near the close of its case. Had the prosecution known about the defense expert earlier, it may have prepared its investigation and case in chief differently. Furthermore, the prosecution would not have had a meaningful opportunity to prepare cross-examination, rebuttal, or impeachment of the expert's testimony. Alternative sanctions, such as a continuance, would not have been sufficient under these circumstances. A midtrial continuance would have delayed the trial and prejudiced the prosecution's case. (See *People v. Santamaria* (1991) 229 Cal.App.3d 269, 277-279 [inherent prejudice in a midtrial continuance, including the jury's fading recollection of the evidence].) "A party who creates prejudice to the other side by surprise or newly listed witnesses should not have the advantage of the disadvantage to which he or she has placed an opponent." (*Gonzales*, *supra*, 22 Cal.App.4th at p. 1757.)

Ineffective Assistance of Counsel

Mueller contends that his counsel rendered ineffective assistance when counsel did not (1) adequately

prepare for trial, (2) hire an expert witness in a timely manner, (3) object to Kenney's testimony regarding Mueller's refusal to participate in the initial investigation, and (4) notify the court that Mueller wanted a new attorney.

A defendant claiming ineffective assistance of counsel has the burden to show (1) counsel rendered deficient performance, and (2) prejudice as a result of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.) To show prejudice, Mueller must prove there was a reasonable probability a more favorable determination would have resulted in the absence of counsel's deficient performance. (See *Strickland*, at p. 688.) A court need not address both prongs of the test before rejecting a claim of ineffective assistance of counsel. If a defendant fails to establish either prong, the claim may be denied. (*Id.* at p. 697.)

1. Adequate Trial Preparation

Mueller contends defense counsel rendered deficient performance based on counsel's lack of trial preparation. However, a defendant is estopped from raising an ineffective assistance of counsel claim where the defendant invited the error. (*People v. Lang* (1989) 49 Cal.3d. 991, 1032 (*Lang*), abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190.)

Here, as the trial court found, "whatever delay has happened with respect to [trial] preparation . . . would appear to be largely the making of the defendant." Mueller did not communicate with counsel, despite counsel's multiple attempts. He cannot now argue that he was deprived of a fair trial "by circumstance of the party's own making." (*Lang*, *supra*, 49 Cal.3d at p. 1032.)

2. Hiring an Expert Witness

Mueller argues defense counsel rendered ineffective assistance when he did not timely obtain the defense expert to testify about the tree's valuation.

Even assuming counsel was deficient for not timely obtaining an expert, Mueller does not show prejudice. Here, counsel only provided an oral representation that the expert would testify the queen palm tree was worth $290. We cannot say based on this limited record that the jury would have accepted this testimony and rejected the prosecution's overwhelming evidence that damages were over $400. Moreover, even if the palm tree itself was worth $290, the prosecution presented uncontested evidence that the installation costs for a comparable tree would have been over $2,000. Under these circumstances, Mueller has not demonstrated a reasonable probability that a more favorable outcome would have resulted had counsel timely obtained the defense expert.

3. Objection to Kenney's testimony

Mueller argues defense counsel was ineffective for failing to object to Kenney's testimony that Mueller said, "I don't have anything to say," during the investigation. He contends Kenney's testimony violated his Fifth Amendment right to remain silent.

When "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.) Here, the record does not show why

defense counsel did not object to Kenney's testimony, nor did the court ask for an explanation.

In any event, counsel was not ineffective because an objection would have been futile. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.) Mueller concedes he was not under arrest or under custodial interrogation at the time he refused to talk to Kenney. There is no unqualified right to remain silent when there is no government compulsion. (*Salinas v. Texas* (2013) 570 U.S. 178, 182-183; *People v. Tom* (2014) 59 Cal.4th 1210, 1223 ["Fifth Amendment privilege against self-incrimination does not categorically bar the prosecution from relying on a defendant's pretrial silence"].) Moreover, the record reflects Mueller merely stated he did not "have anything to say." He did not explicitly invoke his Fifth Amendment right to remain silent. Prearrest silence in response to an officer's question may be used as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege. (*Tom*, at p. 1223; *Salinas*, at p. 183.) There was no violation of Mueller's Fifth Amendment rights. Because an objection would have been futile, we reject the ineffective assistance of counsel claim.

4. Request for New Counsel

Mueller contends defense counsel rendered ineffective assistance when counsel did not alert the court of Mueller's request to substitute counsel. But there is no evidence in this record of a request by Mueller for new counsel, and we will not consider matters outside the record. (*People v. Rinegold* (1970) 13 Cal.App.3d 711, 717.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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